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PHUA SIONG HOE

v.

RHB BANK BHD & ANOR; PERSATUAN PEMILIK TANAH
TAMAN PANDAN (INTERVENOR)*b*HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-1187-1997]
16 NOVEMBER 1998*c***CIVIL PROCEDURE:** *Pleadings - Striking out - Whether abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)***CIVIL PROCEDURE:** *Originating summons - Striking out - Failure to state rule of court and cause of action in application - Whether pleading embarrassing and liable to be struck off**d***CONTRACT:** *Privity of contract - Whether party not privy to agreement can be held accountable - Plaintiff not party to land charge - Whether defendant had right to sell property - Whether plaintiff purchased property and had privity of contract**e*

The first defendant made an application under O.18 r. 19(1) of the Rules of the High Court 1980 ("RHC") to strike out the plaintiff's originating summons in encl. 4 as it was scandalous, or it may prejudice, or delay the fair trial of the action or abuse the process of the court.

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By encl. 4, the plaintiff wanted the first defendant to discharge the charge created over a certain piece of land ("Lot 6613") between the first defendant and the second defendant, even though the plaintiff was not a party to that charge. In a supporting affidavit marked as encl. 3, the plaintiff made reference to an agreement describing the second defendant as vendor and registered proprietor of the land, stating its desire of selling the land to the plaintiff.

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The first defendant pleaded that the intitlement of the originating summons in encl. 4 was defective. It was further submitted that the first defendant was not a party to the agreement entered between the plaintiff and the second defendant.

*h***Held:**

[1] The intitlement to encl. 4 and encl. 3 did not mention any particular rule of court or the relevant law so as to alert this court and the first defendant of the plaintiff's cause of action. The court is inclined to agree with the

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finding in *Cheow Chew Khoon v. Abdul Johari Abdul Rahman & Punca Klasik Sdn. Bhd. (No. 2)* where originating summonses requiring an intitlement must be stated with sufficient particularity, because if otherwise, a party may be able to shift from one rule to another or from one statute to another which may make a mockery of the principle that there must be no surprise in civil litigation. On this basis alone encl. 4 could be construed as defective and should be struck off.

[2] With regards to encl. 3, it was clear that the first defendant was not a party or privy to the agreement. On the concept of privity of contract, the first defendant cannot be held accountable under that agreement.

[3] Since the plaintiff was not a party to that charge, all the authorities point conclusively that the doctrine of privity of contract would be construed to the disadvantage of the plaintiff and he cannot advance his cause in encl. 4.

[4] From the facts, the plaintiff purportedly purchased Lot 6613 from the available 128 lots subdivided from the land. However, no instrument of transfer in any form was exhibited by the plaintiff to substantiate this point. The evidence further showed that there were 127 purchasers who were interested in purchasing the land, but the plaintiff was not one of them.

[5] It is doubtful that the second defendant had the right to sell Lot 6613 to the plaintiff. The second defendant did not pay any money to redeem the said property and only merely submitted that the land was available for sale to the purchaser. That concession can never alter the fact that Lot 6613 already had a Malay gentleman as a buyer who had since passed away. As a matter of fact, it was the prospective intervenor who had paid for the sub-divided titles and its lawyer's fees. The second defendant on the other hand failed to show their interest in Lot 6613.

[6] On the evidence, the plaintiff was not one of the 127 purchasers and had no privity of contract. The plaintiff was a mere stranger and cannot succeed in his encl. 4.

[First defendant's application allowed with costs; Prospective intervenor's application to intervene dismissed without costs; Second defendant's application to discharge the charge of certain Lots including Lot 6613 dismissed without costs.]

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a Case(s) referred to:

Balsamo v. Medici [1984] 1 WLR 951 (**refd**)
Bourne v. Mason [1668] 1 Ventris 6 (**refd**)
Cheow Chew Khoo v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 (**refd**)
Drive Yourself Hire Co (London) Ltd v. Strutt [1954] 1 Q8 250 (**refd**)
Eng Ah Mooi & Ors v. Oversea Chinese Banking Corporation Ltd [1983] 1 MLJ

b 209 (refd)

Hepburn v. A. Tomlinson (Hauliers) Ltd [1966] AC 451 (**refd**)
Kepong Prospecting Ltd & Ors v. Schmidt [1968] 1 MLJ 170 (**refd**)
McGruther v. Pitcher [1904] 2 Ch 306 (**refd**)
New Zealand Shipping Co Ltd v. AM Satterthwaite Ltd (The Eurymedon) [1975] AC

c 154 (refd)

Northern Regional Health Authority v. Derek Crouch Construction Co Ltd [1984] Q8
644 (**refd**)
*Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd (The
New York Star)* [1981] 1 WLR 138 (**refd**)
Price v. Easton [1833] 4 B & Ad 433 (**refd**)

d Punca Klasik Sdn Bhd (No 2) [1996] 5 MLJ 92 (refd)

Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ 601
(**fol**)

Rookes v. Barnard [1964] AC 1129 (**refd**)
Scruttons Ltd v. Midland Silicones Ltd [1962] AC 446 (**refd**)
Singer (UK) Ltd v. Tees & Hartlepool Port Authority [1988] 2 Lloyd's Rep 164 (**refd**)
e *Smith and Snipes Hall Farm Ltd v. River Douglas Catchment Board* [1949] 2 KB

500 (**refd**)
Southern Water Authority v. Carey [1985] 2 All ER 1077 (**refd**)
Swiss Bank Corp v. Brink's-Mat Ltd [1986] 2 Lloyd's Rep 79 (**refd**)
The Forum Craftsman [1985] 1 Lloyd's Rep 291 (**refd**)
Tweddle v. Atkinson [1861] 1 B & S 393 (**refd**)

**f Woodar Investment Development Ltd v. Wimpey Construction UK Ltd [1980] 1 WLR
277 (refd)****Legislation referred to:**

Rules of the High Court 1980, O. 18 r. 19(1)

g Other source(s) referred to:

Law Commission Consultation Paper No: 121, Denning LJ, [1991]
Sixth Interim Report, 5449, [1937], section D

For the plaintiff - Gan Techiong; M/s Gan & Lim
For the 1st defendant - Ang Boon Heng; HH Long & Co

**h For the Official Receiver of Malaysia - Ishak Bakri, FC
For the prospective intervenor - PK Nathan; M/s Nathan & Yang**

Reported by Raja Vishnu Sivarajah

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JUDGMENT

Abdul Malik Ishak J:

This was an application by the first defendant (now known as the RHB Bank Berhad) in encl. 15 to strike out the plaintiff's originating summons in encl. 4 under O. 18 r. 19(1) of the Rules of the High Court 1980 ('RHC') as it was scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action, or otherwise an abuse of the process of the court. Enclosure 15 also prayed for costs to be paid by the plaintiff to the first defendant. Obviously the first defendant was not happy with encl. 4 as it was the plaintiff's originating summons for the following prayers:

- (1) A declaration that the plaintiff was the beneficial owner of a piece of land held under HS (D) 238680, Lot no: 6613, Mukim Tebrau which the plaintiff had purchased from the second defendant namely the 'pegawai penerima Malaysia';
- (2) The first defendant to release the charge *vide* jilid 150 folio 103 dated December 3, 1970 that was registered on the issue document of title of the land known as HS (D) 238680, Lot no: 6613, Mukim Tebrau;
- (3) Damages sustained by the plaintiff because of the default of the first defendant to release the charge and those damages to be assessed by the deputy registrar of the High Court and payable by the first defendant to the plaintiff;
- (4) Costs to be paid by the first defendant; and
- (5) Any other relief deemed fit and proper by the High Court.

In short, encl. 15 was a measure undertaken by the first defendant to nip encl. 4 in the bud. Enclosure 15 was an affair, so to speak, between the first defendant and the plaintiff. The second defendant was not involved at all. Mr. Ang Boon Heng, learned counsel for the first defendant, raised two potent issues that would put an end to encl. 4 once and for all. Firstly, it was argued that the intitulement of the originating summons in encl. 4 was defective. Secondly, an argument was advanced to the effect that the first defendant was not a party to the agreement entered between the plaintiff and the second defendant. I will now proceed to examine these two issues at some length.

The First Issue

The intitulement to encl. 4 and the affidavit affirmed by Phua Siong Hoe on 9 December 1997 in support thereof and marked as encl. 3 cannot be said to be perfect. It left much to be desired. It did not mention any particular Rule

a of Court or the relevant law so as to alert this court and even the first defendant of the plaintiff's cause of action. As Gopal Sri Ram JCA said in *Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 particularly at p. 142 of the report:

b The summons does not, as I observed very early in this judgment, state any particular Rule of Court in its intitlement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which Rule of Court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or originating process that requires an intitlement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the Court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.

d In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitlement must state, with sufficient particularity, either in its heading or in its body, the statute or Rule of Court under which the court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

e It must be emphasised that there was no attempt whatsoever by the plaintiff to amend encl. 4 to make it conformable to the law. In the same vein and relying on *Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari bin Abdul Rahman (supra)*, I did say in *Punca Klasik Sdn Bhd (No 2)* [1996] 5 MLJ 92 especially at p. 99:

f By way of digression, I must say that the plaintiffs have intitled the originating summonses with the relevant provisions of the law. This was indeed a wise move. In this way, the defendants would not be caught off guard and would know what to expect and would be able to mould their defences well in advance. The plaintiffs too would be shackled in that they cannot roam elsewhere by shifting from one rule to another or from one law to another, instead the plaintiffs will have no choice but to stick to their intitlement. In the long run the court too would benefit from the mandatory requirement that originating summonses should be intitled.

g For the record, the case of *Punca Klasik Sdn Bhd (No 2)* was also reported in *Business Law Journal* vide [1995] 4 BLJ 337.

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The result was obvious. Enclosure 4 should be struck off.

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The Second Issue

Enclosure 3 that was in support of encl. 4 made reference to an agreement dated 13 August 1997 between Allstate Enterprise Sdn Bhd (in liquidation) through the official receiver and liquidator – in the context of this case it would be the second defendant, on the one hand, as the vendor and the plaintiff as the purchaser, on the other hand. The agreement described the second defendant as the registered proprietor of that piece of land held under HS (D) 238680, Lot no: 6613, Mukim Tebrau measuring 384.1541 square metres (hereinafter referred to as the “land”) and the second defendant was desirous of selling the land to the plaintiff at the price of RM110,000. The agreement was exhibited in encl. 3 and marked as exh. “PSH1”. It was clear as crystal that the first defendant was not a party to the agreement. On the concept of privity of contract, the first defendant cannot be held accountable under that agreement. In *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601, I had occasion to say something about privity of contract. At pp. 618 to 620 of the report I made these salient observations:

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That is not the end of the matter. The third defendant sought to argue that the concept of privity of contract was severed or at least cut across when the plaintiff purchased Lot 4271 with the knowledge that it was purchased without vacant possession and with all the existing occupiers, squatters, tenants and/or claimants. It was with this knowledge, so it was argued, that the concept of the privity of contract would not apply in regard to the sale and purchase agreement dated 9 July 1991 entered between the plaintiff and the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas in regard to the purchase of Lot 4271. Reliance was heavily placed on two authorities. The first was *Malaysian Australian Finance Co. Ltd v. The Law Union & Rock Insurance Co Ltd* [1972] 2 MLJ 10, while the second was *Beswick v. Beswick* [1966] 3 All ER 1.

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Mohamed Azmi J. (now FCJ) in the *Malaysian Australian Finance Co. Ltd's case (supra)*, in a well written judgment, emphasised the distinguishing features of the case at page 11 in these words:

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In the proposal form dated 11 April 1968, it was disclosed to the respondent that the tractor in question was subject to a hire purchase agreement and the applicant was specifically named therein as the owner. Further, the applicant's interest is endorsed on the policy and there can be no doubt that both Choong Kok Hing and the respondent knew that the policy was in a large measure effected on the applicant's behalf and for its benefit, although Choong Kok Hing was the only person described as the insured in the policy. The fact that the contractual rights of Choong Kok Hing to receive money has been subrogated, in that the

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- a* applicant is given the prior right to receive money under the policy, shows, to my mind, that the policy has been effected by Choong Kok Hing on the applicant's behalf. Having regard to the hire purchase agreement, the proposal form and the insurance policy as a whole, it is reasonable to infer that the intention of Choong Kok Hing in effecting the policy and of the respondent in issuing the same, was primarily to cover the applicant's interest so long as the applicant was the owner of the tractor in question, although the policy did cover Choong Kok Hing's interest as well. The fact that the respondent has disclaimed any liability to Choong Kok Hing's claim does not affect the applicant's insurable interest in the policy. Monies could still be payable under the policy, and, as such, the applicant is a party to the contract and should be entitled to institute claims against the respondent in its own name.
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Even if the applicant is a stranger to the contract of insurance and therefore cannot ordinarily sue on the basis of it, this general rule of law is not absolute and is subject to some exceptions which are definite and recognised. One of these exceptions is where there is a direct agreement to pay to or the respondent constitutes itself as the agent of the third party. This particular exception is illustrated at page 282 of Sanjiva Row's commentaries on *Indian Contract Act* and *Law Relating to Tenders*, 6th Edn. Vol. 1, where the writer said:

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- e* Yet another exception to the general rule is afforded where the promisor, between whom and the stranger no privity exists, creates privity by his personally agreeing with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally.

The other exception is where a trust is created which is illustrated by Sanjiva Row at page 278 as follows:

- f* A third party who is to be benefited under a contract between A and B acquires equitable rights *ex contractu* if the agreement between the parties is so framed as to make one of them a trustee for the third party. In *Gandy v. Gandy* [1885] 30 Ch D 57 at 67, Cotton LJ put the matter thus: 'If the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial interest as *cestui que* trust under that contract; then B would, in a court of equity, be allowed to insist upon and enforce the contract.
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- h* Can the sale and purchase agreement dated 9 July 1991 between the plaintiff and the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas be construed generously so as to secure a benefit to the third defendant in relation to the 20,000 square feet of land? A perusal of the sale and purchase agreement do not show this trend at all. The third defendant was an entire stranger to the sale and purchase agreement dated 9 July 1991 and, consequently, the exception to the privity concept do not apply here.

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Beswick v. Beswick (supra) a decision of the Court of Appeal which was overruled by the House of Lords as reported in [1967] 2 All ER 1197 cannot help the third defendant at all. The House of Lords held the view that a contract which purports to confer a benefit on a stranger to the contract cannot be enforced by that stranger.

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Punca Klasik Sdn Bhd v. All Persons in Occupation of the Wooden Houses Erected on a Portion of Land Held under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor & Anor Case (supra) cited *Kepong Prospecting Ltd & Ors v. Schmidt* [1968] 1 MLJ 170; *UMW Acceptance & Credit Sdn Bhd v. Lahad Datu Timber Sdn Bhd & Ors* [1992] 2 CLJ 1085; *Borneo Housing Mortgage Finance Bhd v. Personal Representatives of the Estate of Lee Lun Wan Maureen & Anor* [1994] 1 MLJ 209; and *Mohd Ali Jahn bin Yusop Sahibjahn & Anor v. Zaleha Mat Zin & Anor* [1995] 1 CLJ 533 for the proposition that strangers to the contract cannot benefit from that contract. The doctrine of privity of contract is well known. It provides that only parties to a contract can enjoy the benefits of that contract or suffer the burdens of it. Consideration must flow or move from the promisee; a person cannot simply sue on a contract if the consideration is provided by another, even where the contract is made for his benefit. A good example would be the case of *Tweddle v. Atkinson* [1861] 1 B & S 393; 121 ER 762 (QB) where John Tweddle and William Guy each agreed to pay a sum of money to the plaintiff (Tweddle's son) in consideration of his marrying Guy's daughter. Guy failed to pay and the plaintiff sought to enforce his promise against Guy's executor. It was held that the son could not enforce the promise despite the fact that the contract was for his benefit since he had given no consideration for it.

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In the same vein, I said almost the same thing at p. 114 of *Punca Klasik Sdn Bhd (No 2)*:

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Next, on 21 January 1994 when the plaintiffs purchased the land from the surviving trustees of the said estate, both Lim and Ng were not involved in the transactions. Both Lim and Ng were not parties to that contract. As strangers to the contract they cannot now say that they should benefit from that contract (see *Kepong Prospecting Ltd & Ors v. Schmidt* [1968] 1 MLJ 170; *UMW Acceptance & Credit Sdn Bhd v. Lahad Datu Timber Sdn Bhd & Ors* [1992] 2 CLJ 1085; *Borneo Housing Mortgage Finance Bhd v. Personal Representatives of the Estate of Lee Lun Wah Maureen & Anor* [1994] 1 MLJ 209 and *Mohd Ali Jahn bin Yusop Sahibjahn & Anor v. Zaleha bte Mat Zin & Anor* [1995] 1 CLJ 533).

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Basically, the first defendant was not a party nor privy to the agreement. By encl. 4, the plaintiff wanted the first defendant to discharge the charge created over the land between the first defendant and the second defendant even though the plaintiff was not a party to that charge. It was indeed an uphill task for the plaintiff to surmount.

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- a* The doctrine of privity of contract is a subject of interest to every lawyer. It is an established principle in the law of contracts and should not be set aside or discarded lightly. To simply abolish the doctrine of privity of contract or to ignore it totally, without more, would certainly represent a major change to the common law involving complex and uncertain ramifications. Of course,
- b* the doctrine of privity has come under attack for its refusal to recognise the right of a third party beneficiary who seeks to enforce contractual provisions made for his or her benefit. Judges and text book writers have come out in the open and pointed out the gaps that sometimes exist between the strict contract theory on the one hand, and the commercial reality on the other. To
- c* relax the law of privity by allowing third party beneficiary to succeed would result in floodgates of litigation in our courts. To me, a contract is a very personal affair, affecting only the parties to it. This court must uphold a strict application of the doctrine of privity as it is not desirable to change the law overnight. Complex changes with very uncertain ramifications must be left to
- d* the wisdom of Parliament. My duty is only to apply the law as it stands. It is not my duty to make an incremental change to the law by developing the common law to make it more consistent with the modern notions of commercial reality and justice. As Crompton J said in *Tweddle v. Atkinson* [1861] 1 B & S 393; 121 ER 762 (QB):
- e* The consideration must move from the party entitled to sue upon the contract. It could be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued.
- Wightman J in the same case remarked:
- f* It is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.
- Lord Reid in *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446 HL remarked:
- g* Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him.
- h* Lord Wilberforce in *Kepong Prospecting Ltd. & Ors v. Schmidt* [1968] 1 MLJ 170 PC, observed at p. 174:
- i* The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it. In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English Law, Schmidt would be unable to enforce

it. Their Lordships need, on this point, do no more than state their agreement with the judgment of the Federal Court which correctly stated the law from well-known passages in the opinions of the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847 at page 853 and *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446 at page 468. But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of *jus quaesitum tertio*. Their Lordships are of opinion that the appellant company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law. It is true that section 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of ‘consideration’ than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue. Reference was made to certain Indian decisions on the Indian Contract Act on which the Contracts (Malay States) Ordinance is based. These were *Subbu Chetti v. Arunachazam Chettiar* [1930] ILR 53 Madras 270 (where however it was said that the balance of authority is in favour of the view that a stranger to the contract cannot without more sue to enforce it) and *Khirod Behari Dutt v. Man Gobinda* AIR 1934 Cal 682. But other decisions in a contrary sense were cited which appeared to their Lordships to be more authoritative: their Lordships refer to decisions cited in *Subbu Chettiar v. Arunachazam Chettiar* and in Pollock and Mulla on the *Indian Contract Act*, 6th Edition, pp. 21 ff. and to two decisions so recent as 1957 (*Protapmull Rameswar v. State of West Bengal* [1957] 61 CWN 78 and *Babu Ram v. Dhan Singh* AIR 1957 Punjab 169). These, in their Lordships’ view, confirm that the law was correctly stated by Sir John Beaumont CJ in the Bombay case of *National Petroleum Co Ltd. v. Popatlal* AIR 1936 Born. 344. In a passage, which though strictly *obiter*, was based on a full argument and consideration of the cases, the learned Chief Justice expressed the view that *Khirod Behari Dutt v. Man Gobinda* was opposed to established principle and authority. An argument on this legal issue was, so their Lordships were informed, submitted to the Federal Court: no reference to it appears in their judgment and their Lordships must assume that they did not accept it. The appellants failed to persuade their Lordships that they were wrong.

Historically, the doctrine can be traced to the year 1668 particularly in the case of *Bourne v. Mason* [1668] 1 Ventris 6 where the plaintiff was not entertained simply because he “did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration.” In *Price v. Easton* [1833] 4 B & Ad 433, the court held that the plaintiff, not being a party to the contract, was unable to recover. The court there also held that an action

- a* for breach of contract must be brought by the person from whom the consideration moved. In 1937, the English Law Revision Committee assumed the existence of the doctrine by recommending that it be virtually abolished (see the *Sixth Interim Report*, 5449 [1937], section D). The same assumption was even made by the English Law Commission in 1991 when it made proposals for the reform of this branch of the law (see the *Law Commission Consultation Paper No: 121* [1991]). Denning LJ himself doubted the existence of the doctrine in at least two cases – one, *Smith and Snipes Hall Farm Ltd v. River Douglas Catchment Board* [1949] 2 KB 500, 514-516; and the other would be, *Drive Yourself Hire Co (London) Ltd v. Strutt* [1954] 1 Q8 250, 272 to 275. But the House of Lords finally resuscitated the doctrine (with Lord Denning dissenting) in *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446 when it affirmed the existence of the doctrine by holding that a person could not take the benefit of an exclusion clause contained in a contract to which he was not a party. Subsequently a host of cases applied the doctrine generously and these cases were:
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- (1) *Rookes v. Barnard* [1964] AC 1129;
 - (2) *Hepburn v. A Tomlinson (Hauliers) Ltd* [1966] AC 451;
 - (3) *New Zealand Shipping Co Ltd v. AM Satterthwaite Ltd (The Eurymedon)*
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- [1975] AC 154;
 - (4) *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138;
 - (5) *Woodar Investment Development Ltd v. Wimpey Construction UK Ltd*
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- [1980] 1 WLR 277;
 - (6) *Northern Regional Health Authority v. Derek Crouch Construction Co Ltd* [1984] Q8 644, 665;
 - (7) *Balsamo v. Medici* [1984] 1 WLR 951, 959-960;
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- (8) *Southern Water Authority v. Carey* [1985] 2 All ER 1077, 1083;
 - (9) *The Forum Craftsman* [1985] 1 Lloyd's Rep 291, 295;
 - (10) *Swiss Bank Corp v. Brink's-Mat Ltd* [1986] 2 Lloyd's Rep 79; and
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- (11) *Singer (UK) Ltd v. Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, 167.

i I do not propose to follow Lord Denning in his treatment of the doctrine. To me the law is rather simple and straightforward. Two persons entering into a contract cannot impose liabilities upon a third party. A simple example can

be found in the case of *McGruther v. Pitcher* [1904] 2 Ch 306 where the plaintiff there was the licensee of the owner of a patent. He manufactured articles under his licence, and pasted inside the lid of each box in which the article was sold a printed slip, stating that it was a condition of the sale that the article was not to be resold at less than a specified price, and that “acceptance of the goods by any purchaser will be deemed to be an acknowledgment that they are sold to him on these conditions and that he agrees with the vendors to be bound by the same.” A purchaser of the articles from a wholesale agent of the plaintiff retailed them at less than the specified price, and the plaintiff sought to restrain him from doing so. The court there held that the action must fail for the simple reason that the plaintiff could not show that any contract existed between himself and the retailer. The sum total of the doctrine would amount to this: A person who is not a party to the contract cannot sue for its breach even though the contract is made expressly for his benefit. Put in another way, a person who is not a party to a contract cannot derive rights or liabilities under it and cannot, therefore, sue or be sued for its breach.

All these authorities point conclusively to the fact that the doctrine of privity of contract would be construed to the disadvantage of the plaintiff as the agreement did not involve the plaintiff at all as a party and, consequently, as a stranger the plaintiff cannot rely on that agreement to advance his cause in encl. 4. Notwithstanding these authorities, Mr. Gan Techiong, learned counsel for the plaintiff, argued that the plaintiff had paid the full purchase price to the second defendant and relied on the case of *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* (*supra*) particularly to the following passages at p. 607 of the report:

The recent decision of the Federal Court in the case of *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad* [1996] 2 CLJ 561 F.C. would strike at the very cord of the present issue. That case lays down a sound principle of law to the effect that a purchaser of a piece of land becomes the beneficial owner only upon completion of the sale. It envisages a situation where upon timeous payment of the full purchase price and the execution of a valid and registrable transfer in the prescribed form in favour of the purchaser would title then pass to the purchaser from the vendor. Edgar Joseph Jr FCJ delivering the judgment of the Federal Court aptly stated the law in erudite terms:

In our view, the contractual events, which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchase, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

- a* As stated earlier that since no instrument of transfer in any form has been executed in favour of the third defendant, the third defendant could not, in law, be said to be the beneficial owner.
- to drive home the point that the plaintiff was the beneficial owner of the land in question. But alas, no instrument of transfer in any form was exhibited in
- b* encl. 3. The case of *Eng Ah Mooi & Ors v. Oversea Chinese Banking Corporation Ltd* [1983] 1 MLJ 209 FC was heavily relied upon and it was used as a leverage to argue that the plaintiff was entitled to seek, in the court, a discharge of the charge. Mr. P.K. Nathan, learned counsel for the prospective intervenor by the name of Persatuan Pemilik Tanah Taman Pandan, rightly
- c* pointed out that in *Eng Ah Mooi & Ors v. Oversea Chinese Banking Corporation Ltd (supra)* the property must be redeemed on tendering the amount of debt. In the present case, so Mr. P.K. Nathan submitted, the debt was paid by the prospective intervenor some 20 years ago as can be seen in exh. "CCK1" of encl. 8. Now, encl. 8 was an affidavit in reply of Chang Chee
- d* Keong that was affirmed on 22 December 1997, while exh. "CCK1" was an "agreement and irrevocable power of attorney" dated 6 December 1977 between the official receiver and Liquidator of Allstate Enterprise Sdn Bhd and Development & Commercial Bank (Ltd) Bhd exh. "CCK1" of encl. 8 showed that there were 127 purchasers who were interested in purchasing 127
- e* lots. The plaintiff was not one of those 127 purchasers. In fact there were 128 lots where one lot thereof was reserved for the government to put up a playground. The plaintiff purportedly purchased Lot 6613 and this very lot already had a buyer, a Malay gentleman who had since passed away (see encl. 9). With respect, the plaintiff here should be the official receiver and not the present plaintiff. It was argued that Lot 6613 was worth RM250,000 but it
- f* was sold for a mere RM110,000. In my judgment, the plaintiff here merely purchased a worthless piece of paper. Even the official receiver was unsure whether they have the right to sell Lot 6613 (see para. 8 of exh. "PSH1" in encl. 3). It was the prospective intervenor that paid for the sub-divided titles. The prospective intervenor too paid for the lawyers' fees. On the other hand,
- g* the official receiver did not pay a cent to redeem the property and in the context of this case Lot 6613. Mr. Ishak Bakri, the federal counsel for the second defendant, merely submitted that the land referring of course to Lot 6613 was available for sale to the plaintiff. That concession can never alter the fact that Lot 6613 had a Malay gentleman as a buyer but unfortunately
- h* he had passed away. To succeed the second defendant must go one step ahead by showing their interest in Lot 6613. Unfortunately, the second defendant failed to do so. A letter emanating from M/s H.H. Long & Co dated 30 April 1997 and addressed to M/s Gan & Lim showed that the second defendant cannot sell Lot 6613 to the plaintiff and that letter has been exhibited in
- i* encl. B and marked as exh. "CCK3". For convenience, that important letter should be reproduced:

H.H. LONG & CO.
ADVOCATES & SOLICITORS,
STATES OF MALAYA AND REPUBLIC OF SINGAPORE

a

FREDDIE LONG HOO HIN – A.M.N., P.I.S.,
Barrister-at-Law
(Lincoln's Inn)

b

ANG BOON HENG LL.B (HONS) London-Barrister-
at Law, (Lincoln's Inn)

OUR REF: HHL/ABH/se/1434/76TP

YOUR REF: GT/JC/L 97122

c

30th April 1997

M/s Gan & Lim,
Advocates & Solicitors,
61, Jalan Tan Hiok Nee,
80000 Johor Bahru.

d

Dear Sirs,

LAND HELD UNDER HS(D) 238680 LOT NO. 6613 MUKIM TEBRAU

e

We refer to your letter dated 29.4.97.

Kindly be informed that *vide* an Agreement and Irrevocable Power of Attorney dated 6.12.77 made between the Official Receiver and Liquidator acting for and on behalf of Allstate Enterprise Sdn Bhd. (in liquidation) and DCB Bank Berhad, formerly known as Development & Commercial Bank (Ltd.) Berhad, the Bank was appointed the lawful attorney of the company, *inter alia*, to apply for the sub-division of titles and to transfer the subject property to various purchasers.

f

In the separate agreement entered between the various purchasers and the bank, the bank has agreed, acting as the lawful attorney of the company, to assign to Taman Pandan Lot Owners' Association of such sub-divided lots which their respective purchasers have not paid the additional payment stipulated therein.

g

We enclose herewith the copy of the Agreement and Irrevocable Power of Attorney and the Agreement between the bank and the various purchasers for your reference. Particularly, kindly refer to clause 3(f) of the agreement.

h

In the circumstances, we are of the view that the Official Assignee cannot now sell and transfer the property to your client.

i

- a* We should be grateful if you could kindly let us have a copy of the contract entered into between your client and the Official Receiver to enable us to liaise with them accordingly.
- Yours faithfully,
- b* Sgd (Illegible)
- For brevity, cl. 3(f) of the agreement that was referred to in the letter of M/s HH Long & Co. dated 30 April 1997 was worded thus:
- c* Pay out from the Consolidated Funds a sum of \$250,000.00 to discharge the charge created on Lot 433 or on the qualified titles relating to the said land and to assign to the Taman Pandan Lot Owner's Association the charge on those qualified titles in respect of which their respective purchaser have not paid the additional payments with the rights to enforce the said charge.
- d* It is germane to mention that Lot 433 was in relation to the Johore Government Grant No. 144, Mukim of Tebrau, District of Johor Bahru containing an area of 18 acres 2 roods 19 poles or thereabouts and Lot 433 was eventually sub-divided into several lots among them Lot 6613.
- e* In my judgment, since the plaintiff was not one of the 127 purchasers he had no privity of contract. The plaintiff was a mere stranger and cannot succeed in his encl. 4. Consequently, the first defendant must succeed in their encl. 15 with costs. This was my judgment and I so hold accordingly. It follows that encl. 10 which was the prospective intervenor's application to intervene need not be dealt with in great detail as it should be dismissed without costs. Enclosure 16 too which was an application by the second
- f* defendant to discharge the charge of certain lots including Lot 6613 should be dismissed without costs.
-
- g*
- h*
- i*